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IN THE

Supreme Court

OF THE UNITED STATES

OCTOBER TERM, 1938

No. .

EDWARD JORDAN DIMOCK, as Substituted Executor of the Last Will and Testament of Henry C. Folger, Deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, Deceased,

Petitioner,

against

WALTER C. CORWIN, late Collector of Internal Revenue, First District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Edward Jordan Dimock, as Substituted Executor of the Last Will and Testament of Henry C. Folger, deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, deceased, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on November 17, 1938.

Opinion Below

The opinion of the District Court for the Eastern District of New York is reported in 19 Fed. Supp. 56. The opinion of the United States Circuit Court of Appeals for the Second Circuit is not yet reported (R. 154-163).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on November 17, 1938 (R. 164). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938).

Questions Presented

The questions presented by this petition are two:

1. Whether the Federal Estate Tax Act of 1926 (Revenue Act of 1926, 44 Stat. 69) is not unconstitutional in purporting to include in the gross estate the survivor's half interest in jointly held property (in addition to including the decedent's half interest) where the joint tenancy was created prior to any federal estate tax act.

2. Whether the Act mentioned does not in terms exempt from inclusion in the gross estate property contributed by the survivor to a joint tenancy, even though such property was first given by the decedent to the survivor, where the gift by the decedent and the contribution by the survivor took place prior to any federal estate tax act.

An additional question was presented below, *i. e.*, whether the amount bequeathed by the decedent to The Trustees of Amherst College to found the Folger Shake-

speare Library in Washington was not in substance, under the New York law, a gift to the next-of-kin and by them to the charity, rather than a gift by the decedent to charity, insofar as it exceeded one-half of the decedent's estate, and therefore as to such excess subject to federal estate tax. That question was decided by the courts below in favor of the petitioner and therefore is not presented by this petition.

Statutes and Regulations Involved

The statutes and regulations involved are set out in the Appendix A *infra*, pages 10-12.

Statement

The facts were stipulated (R. 43-50, inc.) except that brief testimony was introduced by petitioner (R. 38-41, inc.). The facts were found as stipulated and testified to (R. 74-96, inc.) They may be summarized as follows:

On June 11, 1930, Henry C. Folger died a resident of New York leaving him surviving his wife, Emily C. J. Folger (R. 74). Mr. Folger was a New York lawyer who had been chairman of the board of directors of the Standard Oil Company of New York (R. 74, 76).

At the time of his death, Mr. Folger, together with Mrs. Folger, owned, as joint tenants, shares of the stocks of fifteen Standard Oil companies (R. 86, 87). The joint accounts in all of these stocks were created prior to September 9, 1916, the effective date of the first federal estate tax act (R. 87, 88).

Back in 1912, Mr. Folger began making to Mrs. Folger absolute gifts of varying amounts of stock in the Standard Oil Companies. Prior to May 29, 1912, he gave her 251 shares of the capital stock of the Standard Oil Company of New York, and prior to March 10, 1914, he gave

her 656½ shares of the capital stock of the Standard Oil Company (California) (R. 90). The shares of both of these companies were registered in her individual name on the corporate books.

In 1914, Mr. Folger began establishing joint accounts with Mrs. Folger in the stocks of the Standard Oil Companies, registering the stocks in their joint names (R. 86, 87). Mrs. Folger, too, transferred into these accounts in their joint names some of the shares which Mr. Folger had given her outright one or more years before. She transferred 250 of the 251 shares of stock of the Standard Oil Company of New York into their joint names on February 9, 1916, about four years after the gift to her (R. 90). On February 9, 1915, about a year after the gift of the shares of the Standard Oil Company (California), she transferred into a joint account ½ share of the 656½ shares of the stock of that company, and on February 24, 1916, about two years after the gift, she transferred into the joint names the remaining 656 shares (R. 91).

The shares so transferred by Mrs. Folger to the joint names had a value as of the death of Mr. Folger of $846,772.15 (R. 90, 91), and those transferred by Mr. Folger, $2,760,247.04, making a total death value of the shares transferred by both of $3,607,019.19 (R. 89). All of these transfers to the joint accounts were made prior to September 9, 1916, the effective date of the first federal estate tax act (39 Stat. 756) (R. 90, 91).

The estate returned one-half of the value of these jointly held stocks for taxation on the theory that Congress could not constitutionally levy an estate tax upon the survivor's half interest. The Commissioner of Internal Revenue assessed the entire joint estate without even deducting the value of the shares contributed by Mrs. Folger (R. 92, 93).

The Collector of Internal Revenue demanded an additional tax based in part upon the inclusion of the full

value of the joint property in the gross estate. The estate paid the tax, applied for the refund thereof, and, upon its denial, brought this suit for its recovery (R. 94).

The District Court found as conclusions of law that the Commissioner (a) properly determined that the full value of the stocks, held in the joint accounts should be included in the gross and net estates of the decedent for estate tax purposes, and (b) properly determined that no part of the value of the joint accounts representing property transferred thereto by Mrs. Folger should be excluded from the gross and net estates (R. 98, 99). The taxpayer excepted (R. 104) and assigned error on appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 136, 137, 140). The latter affirmed the judgment of the District Court (R. 164).

Specification of Errors to be Urged

The court below erred in holding:

1. That the Commissioner of Internal Revenue properly included in the decedent's gross and net estates for estate tax purposes the full value of the stocks held in the joint accounts.

2. That the Commissioner of Internal Revenue properly included in the decedent's gross and net estates the individual property of Mrs. Folger transferred to the joint accounts by her.

3. That Section 302, subdivisions (e) and (h), of the Revenue Act of 1926, as applied in the circumstances of this case, is valid under the due process clause of the Fifth Amendment of the Constitution of the United States.

4. That the judgment of the District Court should be affirmed.

Reasons for Granting the Writ

I.

The determination of the Circuit Court of Appeals for the Second Circuit in this case, that the survivor's half as well as the decedent's half of property held in joint tenancy may be subjected to federal estate tax even though the tenancy was created prior to any federal estate tax act, is squarely opposed to the determination made by the Circuit Court of Appeals for the Seventh Circuit on June 28, 1938, in *Jacobs* v. *United States* (97 F. 2d 784). The Second Circuit held in the case at bar that Section 302, subdivisions (e) and (h) of the Revenue Act of 1926, requiring the inclusion in the decedent's gross and net estates of the full value of property held in a joint tenancy created prior to the first federal estate tax act, is constitutional, while the Seventh Circuit held in the *Jacobs* case that the same section of the Revenue Act of 1924* is unconstitutional insofar as applied to the survivor's half interest. Beside the cases which the court in the *Jacobs* case cites in support of its conclusion, we refer this Court to *Griswold* v. *Helvering*, 290 U. S. 56, 58 (1933) for a recognition of the practical half interests which two joint tenants hold in the property subject to the tenancy. In view of this conflict between Circuits and of the cogency of the arguments in support of the conclusion reached in the *Jacobs* case, it is submitted that this Court should grant certiorari to review this case.

Certiorari has already been granted in the *Jacobs* case (November 7, 1938) and it is No. 391 for the October Term, 1938. Petitioner believes that, if certiorari is granted herein, this case can be prepared in sufficient time to permit its being heard at the same time as the *Jacobs* case is heard.

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*The 1926 and 1924 Acts are substantially identical in this respect. See Appendix, pages 10 and 11.

II.

The second point in this case is not raised by the *cobs* case. That point is that the individual property Mrs. Folger acquired by her absolutely from Mr. Fol- from two to four years before the passage of any leral estate tax act, and which she transferred to the nt names of herself and her husband prior to any fed- l estate tax act, should not properly be included in . Folger's gross and net estates. This question, in- ving property valued at $846,772.15, the tax upon ich petitioner computes at $26,298.45 (R. 103), appar- ly is raised for the first time in any court in this case. It is our position that even if Congress could constitu- nally have subjected the entire joint estate to federal ate tax, the statute, properly construed, exempts the ntributions made by the survivor, Mrs. Folger.

The exemption on which we rely is that part of Section 2 (e) of the Revenue Act of 1926 (44 Stat. 71) which ads:

> "* * * except such part thereof as may be shown to have originally belonged to (the survivor) and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth."

Congress thus expressly exempted from taxation so ch of the property held in joint tenancy as may be own to have originally belonged to the survivor and *ver* to have been received from the decedent for less an a fair consideration. There is thus an exemption in vor of contributions by the survivor and a limitation the exemption to contributions of property which were ver received from the decedent. The question is whether it limitation is prospective only or whether it is retro- ive back beyond the date when it was written into the . If it is prospective only, it should be read as ex- pting all contributions by the survivor which were ever" *after the passage of this act* "received from the edent", and Mrs. Folger's contributions are exempt be-

cause they were received from the decedent prior to the passage of the act. If, on the other hand, the limitation on the exemption is retroactive, then Mrs. Folger's contributions are taxable because they were *at some time* received from the decedent.

This court has been loath to construe the federal estate-tax act as retroactive. In *Shwab* v. *Doyle,* 258 U. S. 529 (1922), the statute taxed gifts in contemplation of death made *at any time,* but this court (p. 536) construed that expression to mean *at any time* "after the passage of this act." (See also *Hassett* v. *Welch,* 303 U. S. 303, 308 [1938].)

The word "never" is but the negative of the words "at any time", which were construed in the *Shwab* case as prospective only. (Webster's New International Dictionary, Second Edition, 1937.) There is thus no obstacle to construing the word "never" in the statute under consideration as meaning "not at any time after the passage of this act" if the rest of the statute indicates that that was the intent of Congress.

Examining that intent we find that the reason for exempting contributions by the survivor is clear. Congress wished to tax only those transfers where the ultimate effect was a transfer from one joint tenant to the other. If a wife contributed 100% of the joint property and the husband died, Congress wanted to exempt the transfer of what had been the wife's own property back to herself. That was the reason for exempting contributions of the survivor. If, however, Congress stopped there, it would have invited tax evasion. The husband might have wished to give his property to his wife upon his death and to avoid any tax upon it. He could give it to her on one day and on the next have her give it to the joint estate. Then, on his death, there would have been in substance a transfer from him to his wife, but it would have been exempt because the property would have technically been contributed to the joint tenancy by the wife. It is admitted on all hands (*e. g.,* opinion below, R. 160), that it was in order to avoid this evasion that the limitation on the

exemption was inserted in the statute. That purpose is fully carried out by a prospective interpretation. There was no reason for making the limitation retroactive and excluding from the benefit of the exemption property which the decedent had given to the contributor before there was any federal estate tax act to be evaded. Since there is no reason for construing the limitation as retroactive and there is room for construing it as either retroactive or prospective, it should be construed as prospective only and the contributions made by Mrs. Folger from gifts made by Mr. Folger to her before any federal estate tax act should be exempted from tax.

The purposes of the act will be fully served and evasion will still be impossible if the limitation upon the exemption be construed as prospective only. Injustice results from the construction made by the court below. We submit that this Court should review the determination of the court below and construe the statute in accordance with the principles pronounced in *Lewellyn* v. *Frick*, 268 U. S. 238 (1925), where Mr. Justice HOLMES, after stating that acts of Congress are to be construed so as to avoid doubt as to their constitutionality, said at page 251 (italics ours):

> "Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that the laws are not to be considered as applying to cases which arose *before* their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

Conclusion

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

E. J. DIMOCK,
Counsel for Petitioner.

November 21, 1938.

Appendix A

*Revenue Act of 1924, Section 302:**

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * *

"(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: PROVIDED, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: PROVIDED FURTHER, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * * *

"(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

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*Involved in *Jacobs* v. *United States*, 97 F. 2d 784.

Appendix A.

*Revenue Act of 1926, Section 302:**

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * *

"(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: PROVIDED, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: PROVIDED, FURTHER, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * * *

"(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

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*Involved in case at bar.

Appendix A.

*Regulations 70, Art. 22:**

"PROPERTY HELD JOINTLY OR AS TENANTS BY THE ENTIRETY. —The foregoing provisions of the statute extend only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916. The statute specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for the purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common."

Regulations 80, Art. 22:†

"PROPERTY HELD JOINTLY OR AS TENANTS BY THE ENTIRETY. —The foregoing provisions of the statute extend to joint ownerships wherein the right of survivorship exists, regardless of when such ownerships were created. The statute specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. Section 302(e), as amended, applies to all classes of property, whether real or personal, in the case the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common.

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*In force on June 11, 1930, the date of the death of the testator, and until July 3, 1930.

†Presently in force.